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Supreme Court of the United States

OCTOBER TERM, 1950

No._____

HOWARD ANGLIN, HUGH KILGORE, R. T. PIERCE, ALBERT G. MATTHEWS AND LAWRENCE A. JAMES

PETITIONERS

vs.

A. J. BENDER, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

TO the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Georgia entered in the above-entitled case, as hereinafter shown.

SUMMARY STATEMENT OF THE MATTER INVOLVED

This is a petition for a Writ of Certiorari to review the judgment of the Supreme Court of Georgia entered on June 12, 1950, reversing the judgment of the Superior Court of Fulton County, Georgia, which Court had, on the 9th day of January, 1949, entered an order sustaining a general demurrer filed by petitioners attacking the original petition of respondent (plain-

tiff below) as stating no cause of action (R. 13). Petitioners filed their motion for rehearing in the Supreme Court of Georgia within the time provided by law which motion was denied July 13, 1950, (R. 43) at which time an additional opinion was written (R. 36).

OPINIONS BELOW

The order and judgment of Fulton Superior Court (R. 13) is unreported. The opinion and judgment of the Supreme Court (R. 30) has not yet been published in the reports.

Prior to the opinion and judgment of June 12, 1950, and the opinion of July 13, 1950, denying a rehearing, the Supreme Court of Georgia had rendered an opinion (App. D) and judgment on April 11, 1950, affirming the Superior Court of Fulton County (R. 14) but this opinion was withdrawn by the Court on May 11, 1950, on motion for rehearing of the respondent, plaintiff in error below (R. 20).

The judgment of the Supreme Court of Georgia is final and determinative of the one and only question in the case and, as shown by the record, this one Federal question, controls the case. This question is one of law and not of fact. The respondent was granted his pension in 1942. The only question appearing is whether the 1935 Act reducing it to $75.00 per month is valid and the Supreme Court of Georgia has in the decision complained of finally held that Act in violation of the Federal Constitution.

JURISDICTION TO GRANT THE WRIT

The judgment of the Supreme Court of Georgia entered on June 12, 1950, and adhered to by a denial of petitioners' motion for rehearing on July 13, 1950, constitutes a final judgment of the highest Court in Georgia upon the plaintiff's right of action, which question actually will control the case.

The jurisdiction of the Court is invoked under Section 1257(3) of the Judicial Code as amended by the Act of June

25, 1948, (Title 28, United States Code, Section 1257(3), on the ground that the decision below constitutes a ruling that a state statute (Act of 1935, Ga. Laws 1935, p. 450), is invalid and repugnant to the provisions of Art. 1, Sec. 10, Par. 1, of the Constitution of the United States.

The Supreme Court of Georgia, in its opinion sought to be reviewed, also held that the Act of 1935, *supra*, was violative of Art. 12, Sec. 1, Par. 5, of the Constitution of Georgia of 1877, (this section attached hereto as appendix E) but your petitioners show that this *non-Federal* question is so *interwoven* and *enmeshed* with the Federal question presented that the two can not be separated. The Act of 1935, *supra*, could not violate Art. 1, Sec. 10, Par. 1, of the Constitution of the United States without violating Art. 12, Sec. 1, Par. 5, of the Constitution of Georgia of 1877, and it could not be valid as against one Constitutional provision and repugnant to the other.

Unless this Court has the authority and duty to pass upon a Federal question where there is an identical question under the State Constitution, then all a State would have to do to deprive the Supreme Court of jurisdiction as to a given question under a provision of the United States Constitution would be to adopt an identical provision in the State Constitution, and any decision of the State Court could be rested on a non-Federal question.

We rely upon the following cases on this question:

Enterprise Irrigation District v. Farmers Mutual Canal Co., 243 U. S. 157; 37 Sup. Ct. Rep. 318; Moran v. Horsky, 178 U. S. 205, 208; 44 L. Ed. 1038, 1039; 20 Sup. Ct. Rep. 856; Creswill v. Grand Lodge, K. P., 225 U. S. 246, 261; 56 L. Ed. 1074, 1080, 32 Sup. Ct. Rep., 822.

QUESTION PRESENTED

One question only is involved in the merits of the case. That question is whether an act of the general assembly of Georgia amending the Firemen's Pension Plan of the City of Atlanta

which is substantially supported by taxation, and which included among other things a reduction in the amount of monthly pension payments to firemen who retire under the plan, is unconstitutional and in violation of Art. 1, Section 10, Par. 1, of the Constitution of the United States in that it impairs the obligation of contracts. The Georgia Court held the act unconstitutional and we think this contrary to the law as pronounced by this Court and others.

STATUTES INVOLVED

For the convenience of the Court we are attaching as appendixes A, B, and C, the three Georgia Statutes (omitting their captions) which are involved in the case (appendix A, Georgia Laws 1924, p. 167; appendix B, Georgia Laws 1931, p. 223; appendix C, Georgia Laws 1935, p. 450).

THE FACTS OF THE CASE

The facts of this case as stated in the opinion of the Supreme Court of Georgia of June 12, 1950, are as follows:

> "A. J. Bender, a retired member of the Fire Department of the City of Atlanta, petitioned the Fulton Superior Court for the issuance of a writ of mandamus absolute requiring the Board of Trustees of the Firemen's Pension Fund of the City of Atlanta to pay him the sum of $25 per month from August, 1942, to date, in addition to the $75 which he has been paid per month since his retirement in 1942. His contentions as made by his petition, briefly stated, are as follows: The pension fund was established by the City of Atlanta under the provisions of the Act of 1924 (Ga. L. 1924, p. 167), and under this act as amended by the Act of 1931 (Ga. L. 1931, p. 223), he, as a member of the Fire Department, was, after 25 years service, entitled to retire as a matter of right and receive a monthly pension of $100 per month for the remainder of his life. He became a member of the Fire Department in 1915, and under the provisions of these acts he was assessed first 1 per centum of his monthly salary and later the sum of 2 per centum which was paid into the pension fund up to the time of his retirement. In

1935 the pension acts were amended (Ga. L. 1935, p. 450), and the amount of pension thereafter to be paid was reduced to $75 per month. In August, 1942, the petitioner made application for retirement and was placed on the pension roll, and since that time he has been paid the sum of $75 per month. In March, 1949, he made application to the defendants for an adjustment in his pension, and demanded that his pension be increased to $100 per month, to be retroactively applied to August, 1942. His application being denied, he then instituted the present proceeding, contending that the Act of 1935 as applied to him was unconstitutional and void as being (a) violative of art. 1, sec. 10, par. 1, of the Constitution of the United States in that said amendment impaired the obligation of the contract between him and the City of Atlanta whereby the defendants were obligated to pay him $100 per month and that said act was an ex post facto law which attempted retroactively to change, modify, and annul the contract between him and the city; and (b) violative of art. 12, sec. 1, par. 5, of the Constitution of Georgia of 1877 because said act deprived him of a right granted to him under the Act of 1924, as amended by the Act of 1931, by reducing his pension without his knowledge or consent.

"The general demurrers of the defendants to the petition being sustained, the plaintiff, by writ of error, seeks a reversal of the order dismissing the petition."

The opinion of June 12, 1950, of the Supreme Court of Georgia reversed the lower Court and a rehearing was denied July 13, 1950, at which time an additional opinion was written.

REASONS FOR GRANTING THE WRIT

(1) The opinion and decision of the Supreme Court of Georgia is in direct conflict with the leading case decided by this Court on the subject, to-wit, Pennie v. Reis, 1889, 132 U. S. 464, 10 S. Ct. 149, 33 L. Ed. 426. In that case, under similar circumstances, the Court held that "as the police officer never received the amount so retained, nor had any power of disposition over the same, he had no property rights in such fund, which was in effect created by the state, until the happening

of the contingency upon which the statute provided that part of it should be paid to him, or his representative, and until that time the fund was entirely at the disposal of the state."

The Georgia Court here has said, "the agreement of the City of Atlanta to pay benefits to the firemen was a contract with consideration flowing from both parties, and gives to the firemen a vested right which is protected by the inhibition against the impairment of the obligation of a contract which is found in both the State and Federal Constitutions."

It seems clear to us that these two pronouncements on similar facts are irreconcilable and that this brings us squarely within the purview of Rule 38, Sec. 5(a), of the Revised Rules of the Supreme Court of the United States.

(2) In addition to the conflict of the decision complained of with the case of Pennie v. Reis, we think the writ should be granted because the Georgia Court has committed grievous error in a matter of great public importance. We think that the Court will take cognizance of the fact that many pension plans have been adopted for various employees of counties and municipalities not only in Georgia but all over the nation. To carry out the purpose of these plans huge sums of money are required and these moneys are in the main derived from *taxation of the public.* The adoption of a pension plan does not impose an immediate obligation on the public treasury but one to be discharged in the future and what may be fair and just between the taxpayer and the employee at the time of the plan's adoption may become unreasonable and unjust with the passage of time and a changing economy. Indeed, a compulsory and rigid adherence to the original plan adopted might well result in bankruptcy to the municipality as a result of a changed situation. For these reasons it is fundamental that pension plans supported wholly or in part by taxation must remain flexible and subject to modification to meet changing economic conditions. And as we shall briefly show in the next paragraph the courts have almost universally held them to be so. In reliance on this decision law, various pension statutes have been passed,

including the one here in question, and it must be presumed that legislative bodies in passing these acts did so under an assumption that their acts could be modified if changed conditions so demanded. Practically all decisions of the courts, including both this Court and the Supreme Court of Georgia, had so indicated. To hold otherwise at this time after pension plans have been adopted in reliance on the court decisions as they then existed seems to us not only unfair but extremely dangerous to the economy of the many cities and counties who will be affected thereby.

(3) As a cumulative reason for granting of the writ (which we realize would probably not be sufficient of itself) we point out that the decision below is in conflict with the overwhelming weight of authority as indicated by courts of last resort in other states and applicable textbooks. This will be demonstrated in the argument to follow.

ARGUMENT

We have heretofore pointed out the conflict of the decision below with the case of Pennie v. Reis, *supra*. In addition, it is out of harmony with practically all the pronouncement of other courts. We quote briefly from the opinion of April 11, 1950, by Justice Almand of the Supreme Court of Georgia (which we attach to this petition as appendix D) which opinion was later withdrawn by a majority of the Court:

> "The rule that such municipal officer or employee has no such vested interest in such fund, in the absence of express legislative declaration creating such right, before his actual retirement, that prevents the legislature from reducing the amount of monthly pension to be paid upon retirement, is supported by practically all of the authorities from other jurisdictions. Pennie v. Reis, 132 U. S. 464; Emanuel v. Sproat, (N. J.) 54 Atl. (2d) 765; Risch v. Board of Trustees of Policemen's Pension Fund (Wis.), 98 N. W. 954; Lage v. City of Marshalltown (Iowa), 235 N. W. 761; Lickert v. City of Omaha (Neb.), 12 N. W. (2d) 644; Bartlett v. Thompson (Wis.), 16 N. W. (2d) 420; Klench v. Board of Pension Fund Commis-

sioners of Stockton (Cal.), 249 Pac. 46; Miller v. Price (Ky.), 139 S. E. (2d) 450. For annotations on the subject, see 54 A.L.R. 943; 98 A.L.R. 505; 112 A.L.R. 1009; 137 A.L.R. 249."

Justice Almand, in his opinion, also, quoted at length from Dillon on Municipal Corporations (5 ed.), Sec. 431, where the point is made in more detail. As his opinion is attached as appendix D, and before the Court we will not here reproduce the quotation but confidently assert that here again it is demonstrated the Court below is in error and its opinion against the overwhelming weight of authority.

Until the decision herein sought to be reviewed we believe that the Supreme Court of California had gone further than any other court in holding that an employee under a similar plan had a vested interest in a *pension*. However, that Court in protecting an employee from an outright repeal of the pension plan recognized the right of the legislature to make modifications and changes in the system including modifications as to the amount, terms, and conditions of the pension benefits. See Kern v. The City of Long Beach, 179 Pac. (2d) 799.

Although the Kern case establishes for California an exception to the general rule, we commend it to the Court's attention since it contains an exhaustive collation of the decisions of this country on the question involved. In it the Court said:

> "The ruling permitting modification of pensions is a necessary one since pension systems must be kept flexible to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system and carry out its beneficent policy. The permissible scope of changes in the provisions need not be considered here, because the respondent city, with a minor exception, has repealed all pension provisions.
>
> "(7) Thus it appears, when the cases are considered together, that an employee may acquire a vested contractual right to a pension but that this right is not rigidly fixed by the specific terms of the legislation in effect during any particular period in which he serves. The statutory lan-

guage is subject to the implied qualification that the governing body may make modifications and changes in the system. The employee does not have a right to any fixed or definite benefits, but only to a substantial or reasonable pension. There is no inconsistency therefore in holding that he has a vested right to a pension but that the amount, terms and conditions of the benefits may be altered."

Later, the California Court quoted:

"The general rule is stated in 21 R.C.L. 242 as follows:

" 'The unquestioned rule is that a pension granted by the public authorities is not a contractual obligation but a gratuitous allowance, in the continuance of which the pensioner has no vested right; and that a pension is accordingly terminable at the will of the grantor, either in whole or in part. It is, however, conceded that where any particular payment under a pension has become due, the petitioner has a vested right to it. In some instances pension funds are maintained in part by compulsory contributions of the beneficiaries thereof. This is generally true where the beneficiaries are policemen or firemen; and in such a case the statute creating the fund ordinarily authorizes the proper official to retain weekly or monthly a certain per cent of the prospective pensioner's pay. By the great weight of authority the fact that a pensioner has made such compulsory contribution does not give him a vested right in the pension. In such cases the amount retained, though called part of the officer's compensation, he never received or controlled, nor could he prevent its appropriation to the fund.' "

Moreover, the majority of the Supreme Court of Georgia has, in our judgment, refused to follow its own decisions. In the case of Trotzier vs. McElroy, 182 Ga. 719, upon which the decision complained of was substantially predicated, the Court said:

"The editors of A.L.R. have stated in these annotations what we deem to be the proper construction and conclusions to be derived from the cases. On page 943 it is stated that 'The unquestioned rule is that a pension granted by the public authorities is not a contractual obligation, but a gratuituous allowance, in the continuance of which the

pensioner has no vested right; and that a pension is accordingly terminable at the will be the grantor.' On page 945 the rule as to when a right to a pension becomes vested is stated as follows: 'It is, however, conceded that where any particular payment under a pension has become due, the pensioner has a vested right therein. Pennie v. Reis (1889), 132 U. S. 464, 33 L. ed. 426, 10 Sup. Ct. 149; Dale v. Governor (3 Stew. (Ala.) 387); Kavanagh v. Police Pension Fund Comrs. (1901), 134 Cal. 50, 66 Pac. 36; Macfarland v. Bieber (1909), 32 App. D.C. 513; Re Smith (1902), 130 N. C. 638, 41 S. E. 802. See also Smith v. Alkin (1890), 80 Mich. 205, 45 N. W. 136. Compare Donnelly v. United States (1881), 17 St. Cl. (Fed.) 105.' Accordingly, the ruling in this case is restricted to a holding that the pension is due only where the contingency provided for has occurred before a change in the charter, ordinance, or statute under authority of which the pension was to be paid. In the present case it is undisputed that the petitioner's rights had become vested before the amendatory act of March 28, 1935 (supra); and he became entitled, as a matter of right, to a pension of $100 per month and was actually being paid."

This restriction was expressly recognized in Dewitt v. Richmond County, 192 Georgia 770, on page 777, where the Court said:

"While the employee has an inchoate interest in the fund thus retained by the county, he has no title thereto or vested interest therein until the happening of the event which under the terms of the statute entitles him to payments therefrom in conformity with the provisions of the law. In Pennie v. Reis, 132 U. S. 464 (10 Sup. Ct. 149, 33 L. ed. 426), which was a case involving a statute of California very similar to the present act, it was held that since the Government had never parted with possession and custody of the deductions made from the employee's salary, title thereto remained in the Government and the employee had no vested right therein until the happening of the condition which the statute provided would entitle him to benefits therefrom. In *Trotzier* v. *McElroy*, 182 Ga. 719 (186 S. E. 817), the pensioner's right to receive $100 per month under the terms of the statute had accrued, and

he was actually receiving this amount when the act was amended reducing his pension to $75 per month; and this court held, that, the contingency provided for in the statute having occurred before the change in the statute by amendment, the right of the pensioner was a vested right and the amendment changing that right was unconstitutional and void; but the ruling was expressly restricted to holding only that the right of the pensioner was vested because of the happening of the contingency."

Further, the Supreme Court of Georgia held in Carlton v. West, 174 Ga. 394, that a fireman who had served 35 years (10 more than the minimum required for pensioning under the act) could not recover under the 1924 act where he was suspended from active duty on account of misconduct before making application for his pension. The case turned on his misconduct but, obviously, had he a vested contract right at the end of 25 years he would not have lost the same on account of misconduct. No law in America that we know of authorizes such a forfeiture in the absence of a statutory provision therefor. It follows that the Court did not then believe the right of the employee under the plan to be vested.

It will be noted from the exhibits attached to the petition that Georgia has not attempted to repeal the pension plan for firemen in Alanta. It has merely, from time to time, modified the plan. Frequently such modifications increased the benefits payable. This, under the decisions heretofore rendered, we believe, the General Assembly of Georgia had a right to do. Certainly, we do not think their action in violation of the Constitution of the United States.

We feel the case to be one of utmost importance to the taxpaying public generally and we respectfully request that the writ of certiorari be granted, as prayed.

WHEREFORE, your petitioners pray that a writ of certiorari be granted under the seal of this Court directed to the Supreme Court of Georgia, to the end that this cause may be reviewed and determined by this Court as provided for by the Statutes of

the United States; and for such further relief as to this Court may seem proper.

J. C. SAVAGE, J. C. MURPHY,
J. M. B. BLOODWORTH,
JOHN E. FEAGIN AND HENRY L. BOWDEN,
Attorneys for Petitioners

ACKNOWLEDGMENT OF SERVICE

Due and Legal Service and Notice of the within petition for the writ of certiorari is hereby acknowledged. Copy received. All other and further service or notice as regards the petition for certiorari is waived.

This 30th day of September.

HAROLD SHEATS,
GUY PARKER,
Counsel of Record for Respondent

APPENDIX A

Georgia Laws 1924, Page 167

Section 1. Be it enacted by the General Assembly of the State of Georgia, and it is hereby enacted by authority of the same, that from and after the passage of this Act there shall be raised and established funds for the aid, relief and pension of members of paid fire departments who are in active service at the time of the passage of this Act and whose names are on the pay roll of such departments and future members of such departments, and their dependents in all cities in Georgia having a population of more than one hundred and fifty thousand (150,000) by the United States census of 1920 or any subsequent census of the United States.

Sec. 2. Be it further enacted that any member of such fire department who is in active service at the time of the passage of this Act and whose name is on the pay roll, and future members, may as a matter of right, retire from active service, pro-

vided he shall have served twenty-five (25) years in active service at the time of his retirement.

Sec. 3. Be it further enacted that any member of such department who is in active service at the time of the passage of this Act and whose name is on the pay roll and future members who shall be injured or whose health shall become permanently impaired to such an extent as to render him totally disabled as a result of such service shall upon application be retired. Should the board of trustees refuse to grant an order of retirement, the applicant shall select a physician, the board shall select a physician, and the two physicians so selected shall select a third. These three shall examine the applicant and determine whether he is totally disabled and the decision of a majority of these physicians shall be final on the question.

Sec. 4. When such member shall retire as a matter of right he shall be paid one-half of the salary he was receiving at the time of his retirement, for the rest of his life, to be paid monthly. In case of death of a pensioner his widow and children shall draw his pension as herein provided in case of death of member of such department.

Sec. 5. When such member shall be retired for total disability he shall be paid one-half of the salary he was receiving at the time of his retirement for the rest of his life, to be paid monthly, but this Act shall not affect the salary of a member in active service, except the tax of one (1) per cent thereon.

Sec. 6. Be it further enacted that there is hereby established to serve without pay, a board of trustees whose duties it shall be to manage said funds which shall be kept by the City Treasurer of such cities as a separate fund and covered by his bond as such. The board of trustees shall consist of the city treasurer, the city comptroller, the chief of the fire department, and two members of the fire department to be elected by the members of said department in active service on the first Monday in September every year atfer the passage of this Act. These two members of the department to serve one year and until their

successors are elected. The city comptroller, city treasurer and chief of the fire department to be permanent members of the board.

Sec. 7. This board shall make all rules for the payment of said funds to those entitled to receive the same. It shall have its first meeting on Wednesday following the first Tuesday in September after the passage of this Act and organize by electing a chairman, a vice-chairman who shall serve when the chairman is absent, and a secretary. The chairman shall sign all vouchers for the disbursements of the fund and his written order shall fully protect the city treasurer in the payment of the same. A majority of the board shall control on all questions.

Sec. 8. The board shall make its own rules as to times and places of meetings.

Sec. 9. A tax of one (1) per centum shall be levied on the salaries of all members in active service at the time of the passage of this Act monthly; and the city treasurer shall retain that amount from their salaries.

Sec. 10. A tax of one and one-fourth (1¼) per centum shall be levied against the premiums of all fire and lightning insurance companies or associations on property situated within the corporate limits of such cities, and returns by said companies or associations made and tax collected as now provided by ordinance in such cities, to be collected fro n and after passage of this Act. One-fifth (1/5) of the tax provided in this section shall go to aid, relief, and pension funds provided in this Act.

Sec. 11. The city treasurer shall keep separate and apart from other monies in his possession the funds raised in Sections 9 and 10 hereof for the sole uses mentioned in this Act, and subject to the orders of said board of trustees.

Sec. 12. The said city tax on insurance premiums on property situated in the corporate limits of such cities shall be and is hereby limited to one and one-fourth (1¼) per centum.

Sec. 13. The board of trustees shall formulate rules for taking care of members in active service at the time of the passage of this Act while temporarily sick or hurt, and paying the expense thereof. The board of trustees shall formulate rules for paying the pension of a member of the department who loses his life in the service to his widow till she dies or remarries; and for paying to widow and children pension of deceased pensioner; and for paying the pension of such decreased fireman to his orphan children till they reach the age of sixteen; provided the total payments to widow and orphan or orphans shall not exceed one-half the pay of such deceased fireman. The trustees shall keep a strict account of the disbursements and receipts of all funds which shall be opened at all times to public inspection.

Sec. 14. In case a member has served twenty-five years does not desire to retire, and the board of trustees deem such member incapable of further service in the department; the same proceeding shall be had as that to determine the condition of a disabled fireman as set forth in Section three (3) hereof. The decision shall be final.

Sec. 15. The city attorney shall without extra compensation render such legal service as such board of trustees shall require.

Sec. 16. In case there should accumulate more funds than should be needed for immediate use, the board of trustees are empowered to invest such excess funds in United States, Georgia, or municipal bonds; but not otherwise.

Sec. 17. Be it further enacted that none of the funds herein mentioned shall be subject to attachment, garnishment, judgment; nor shall they be assignable; but shall be paid in cash to the beneficiary if so requested by him or her.

Sec. 18. Be it further enacted that if any part of this Act shall be held unconstitutional, the remainder of this Act shall be of full force and effect provided the general terms of this Act can still be carried out.

Sec. 19. Bt it further enacted that this Act shall not repeal nor in any wise affect any benefit or pension now being paid to those who were receiving the same prior to the passage of this Act.

Sec. 20. Be it further enacted that the plan and purpose of this Act is to furnish aid, relief and pension to aged and disabled firemen who are now or may be in the future in the active service of such departments and on the pay roll of such departments and to their dependents. That the taxation herein provided is a part of the general purpose of this Act to accomplish this end.

Sec. 21. Provided this Act shall not affect or be affected by any workman's compensation law, or other similar laws.

Sec. 22. Be it further enacted that all laws and parts of laws in conflict herewith, be and the same are hereby repealed.

Approved August 13, 1924.

APPENDIX B

Georgia Laws 1931, Page 223

Section 1. Be it enacted by the General Assembly of Georgia, and it is hereby enacted by authority of the same that from and after the passage of this Act, a certain Act approved August 13, 1924, published in the Acts of 1924, pages 167 to 173, inclusive, entitled "An Act to provide that cities having a population of more than one hundred fifty thousand (150,000) by the United States Census of 1920 or any subsequent census, shall furnish aid, relief, and pensions to members of paid fire departments now in active service, etc.; and for other purposes," and Acts amendatory thereof, be and the same is hereby amended by striking section 4 of said Act and inserting in lieu thereof a new section 4 which shall read as follows: Section 4. When such member shall retire as a matter of right, he shall be paid thereafter one-half of the salary he was receiving at the time of his retirement for the rest of his life, unless said one-half salary should be less than $100.00 per month, in which

event the sum of $100.00 per month shall be paid for the rest of his life, to be paid monthly, provided he shall have served the 25 years in active service at the time of his retirement, or shall have become totally disabled in the line of duty at any time as aforesaid. In case of death of a pensioner, his widow, if any, shall receive during her life and until remarried, the amount of pension being paid to said pensioner at the time of his death. If pensioner leaves no widow, but leaves orphan children under the age of 16 years, such orphan child or children shall receive until reaching the age of 16 years the pension being paid to said pensioner at the time of his death. Upon the death of any pensioner under this Act, from any cause, who has no dependent entitled to his pension, the money he has paid into the pension fund shall be paid to his beneficiaries or to his estate at his death. Upon the death of an unmarried pensioner who is supporting a widowed mother, the amount of pension being paid to him at the time of his death shall thereafter be paid to his said mother during the period of her life or until she marries.

Sec. 2. Be it further enacted, that section 5 of the aforesaid Act approved August 13, 1924, be and the same is hereby stricken and a new section 5 inserted in lieu thereof, which shall read as follows, to-wit: Section 5. When such member shall be retired for total disability, he shall be paid one-half of the salary he was receiving at the time of his retirement (or the sum of $100.00 per month if said one-half of his salary does not equal or exceed that sum) for the rest of his life, to be paid monthly; but this Act shall not affect the salary of a member in active service, except the tax of one (1%) per cent thereon.

Sec. 3. The aforesaid Act approved August 13, 1924, is further amended by inserting after section 5 of said Act a new section to be known as Section 5-a, said section to read as follows: Section 5-a. Should any member become totally disabled (not from self-abuse) so as to make such member unfit for fire duty or services, he shall receive a pension graduated according to the length of his service before such disability as follows:

Five (5) years service	$ 20.00 per month
Ten (10) years service	40.00 per month
Fifteen (15) years service	60.00 per month
Twenty (20) years service	80.00 per month
Twenty-five (25) years service	100.00 per month

Upon the death of such member while receiving this pension, his widow, if any, shall continue to draw the same during her life or until she remarries; and if no widow, his minor child or children shall draw the same until reaching the age of 16.

Sec. 4. Said Act approved August 13, 1924, is further amended by adding thereto after section 6 a new section to be known as Section 6-a, which shall read as follows: Section 6-a. The two trustees who are members of the fire department and who are elected the first Monday in September 1931 shall be elected for a term of four (4) years and two (2) years respectively, the trustee receiving the highest number of votes to serve for four years and the one receiving the next highest number of votes to serve for two years, and their successors thenceforth to serve for terms of four years.

Sec. 5. Said section 10 of said Act approved August 13, 1924, is hereby amended by striking the same in its entirety and inserting in lieu thereof a new section 10 which shall read as follows: Section 10. A tax of one and one-fourth (1¼) per centum shall be levied against the premiums of all fire and lightning insurance companies or associations on property situated within the corporate limits of such cities, and returns by said companies or associations made and tax collected as now provided by ordinance in such cities, to be collected from and after the passage of this Act. The tax provided in this section shall go to aid, relief, and pension funds provided in this Act.

Sec. 6. Said Act approved August 13, 1924, is further amended by striking therefrom section 16 thereof and inserting in lieu thereof a new section thereby known as section 16, which shall read as follows: Section 16. In case there should accumulate more funds than should be needed for immediate use, the board of trustees are empowered to invest such excess

funds in United States, Georgia, or municipal bonds; but not otherwise. Should there be on hand insufficient funds to carry out the purposes of this Act, such additional funds as are necessary therefor shall be paid out of the treasury of the city.

Sec. 7. Be it further enacted, that all persons now receiving pensions under the provisions of said Act approved August 13, 1924, shall henceforth receive such pensions in the amounts provided for in this Act.

Sec. 8. Be it further enacted, that all laws and parts of laws in conflict herewith be and the same are hereby repealed.

Approved August 24, 1931.

APPENDIX C

Georgia Laws 1935, Page 450

Section 1. Be it enacted by the General Assembly of Georgia, and it is hereby enacted by authority of the same, that from and after the passage of this Act, a certain Act approved August 13, 1924, published in the Acts of 1924, pages 167 and 173, inclusive, entitled "An Act to provide that cities having a population of more than one hundred fifty thousand (150,000) by the United States census of 1920 or any subsequent census, shall furnish aid, relief, and pensions to members of paid fire departments now in active service, etc., and for other purposes," and Acts amendatory thereof, be and the same is hereby amended by striking section 4 of said Act as amended and inserting in lieu thereof a new section 4 which shall read as follows:

> Section 4. When such member shall retire as a matter of right, he shall be paid thereafter for the rest of his life the sum of $75.00 per month, provided he shall have served the 25 years in active service at the time of his retirement, or shall have become totally disabled in the line of duty at any time as aforesaid. In case of death of such pensioner, his widow, if any, shall receive during her life or until remarried, the sum of $50.00 per month; provided however, that no such widow shall receive any such

sum hereunder unless she was the lawful wife of said pensioner prior to his retirement from active service. If such pensioner at death leaves no widow or if pensioner's widow was not the lawful wife of pensioner prior to his retirement from active service but leaves orphan children under the age of 16 years, such orphan child or children, except adopted children, adopted subsequent to said pensioner's retirement from active service, shall receive until reaching the age of 16 the sum of $50.00 per month. Upon the death of any member or pensioner under this Act, from any cause, who has no dependents entitled to his pension, the money he has paid into the pension fund shall be paid to his estate at his death.

Sec. 2. Be it further enacted that section 5 of the aforesaid Act approved August 15, 1924, as amended, be and the same is hereby stricken and a new section 5 inserted in lieu thereof which shall read as follows: Section 5. When such member shall be retired for total disability, he shall be paid $75.00 per month for the rest of his life; but this Act shall not affect the salary of a member in active service, except the tax of 2% thereon.

Sec. 3. The aforesaid Act approved August 13, 1924, as amended, is further amended by striking section 5-a, as set up by the Act of the General Assembly of Georgia, approved August 24, 1931, amending said Act, and inserting in lieu thereof a new section 5-a, to read as follows:

Section 5-a. Should any member become totally disabled so as to make such member unfit for fire duty or services, he shall receive a pension graduated as follows:

After five (5) years service	$15.00
After ten (10) years service	30.00
After fifteen (15) years service	45.00
After twenty (20) years service	60.00
After twenty-five (25) years service	75.00

Upon the death of any member or pensioner, not in line of duty, his widow, if any, shall be paid during the rest of

her life or until she remarries the sum of money monthly graduated according to the length of service of her deceased husband before his retirement on account of disability, or before his death, as follows:

After five (5) years service	$10.00
After ten (10) years service	20.00
After fifteen (15) years service	30.00
After twenty (20) years service	40.00
After twenty-five (25) years service	50.00

provided, however, that no such widow shall receive any sum hereunder unless she was the lawful wife of said pensioner prior to the time he became disabled. If said pensioner or member die without leaving a widow, or if pensioner's widow was not the lawful wife of pensioner prior to his disability, pensioner's minor child or children, except adopted children, adopted subsequent to said pensioner's retirement from active service, shall be paid the same gross sums and according to the same graduated schedule as set out above for the widow until they reach the age of 16.

Sec. 4. Said Act approved August 13, 1924, and amended by an Act approved August 24, 1931, is further amended by striking sections 6 and 6-a of said Act, as amended, and inserting in lieu thereof a new section 6 to read as follows: Section 6. Be it further enacted that there is hereby established, to serve without pay, a Board of Trustees whose duties it shall be to manage said funds which shall be kept by the City Treasurer of such cities as a separate fund and covered by his bond as such. The Board of Trustees shall consist of the City Treasurer, the City Comptroller, and three members of the fire department to be elected by the members of said fire department in active service, on the first Monday in September after the passage of this Act. The member receiving the highest number of votes shall serve for a term of three years from his election or until his successor is elected. The member receiving the second highest number of votes shall serve for a term of two years from his election or until his successor is elected. The member receiv-

ing the third highest number of votes shall serve for a term of one year from his election or until his successor is elected. Thereafter, upon the expiration of the term of each such Trustee the members of said department shall vote upon a successor to said Trustee and the member receiving the highest number of votes shall be elected for a term of three years or until his successor is elected. The City Comptroller and City Treasurer shall be permanent members of the board.

Sec. 5. Said Act approved August 13, 1924, is further amended by striking section 9 of said Act and inserting in lieu thereof a new section 9 to read as follows: Section 9. A tax of two (2) per centum shall be levied on the monthly salaries of all members in active service at the time of and after the passage of this Act, and the City Treasurer shall retain that amount from their salaries to be applied toward the purposes of this Act.

Sec. 6. Be it further amended that said Act approved August 13, 1924, as amended, be further amended by striking therefrom section 10 of said Act, as amended, and inserting in lieu thereof a new section 10 to read as follows: Section 10. A tax of one and one-fourth (1¼) per centum shall be levied against the premiums of all fire and lightning insurance companies or associations or property situated within the corporate limits of such cities, to be collected from and after the passage of this Act. Should this section of this Act, or should Section 9-a above, be declared unconstitutional or invalid for any reason, the law in force prior to the passage of this Act under section 10 of the Act approved August 13, 1924, as amended by the Act approved August 24, 1931, shall be and remain in force and shall apply to the provisions contained in other sections of said Act as amended.

Sec. 7. Said Act approved August 13, 1924, as amended by an Act approved August 7, 1925, and by an Act approved August 24, 1931, is further amended by striking section 14-a of said Act as amended and inserting in lieu thereof a new section 14-a to read as follows: Section 14-a. Be it further enacted that

when any fireman who has served twenty-five years and is in active service at the time of his death dies, his widow or minor children, natural or adopted, shall receive the same pension she would have received under this Act as amended had such fireman been retired and receiving a pension under Section 4 thereof.

Sec. 8. Be it further enacted that all persons now receiving pensions under the provision of said Act approved August 13, 1924, and amendments thereto, shall henceforth receive such pensions in the amounts and only under the conditions provided for in this Act. Provided, however, that all persons now receiving pensions under said Act approved August 13, 1924, as amended, on account of total disability not from accident in line of duty but after five (5) years service, shall after the passage of this Act receive the sum of $15.00 per month.

Sec. 9. Be it further enacted that should any clause or portion of this Act be declared unconstitutional or invalid by any court of this State for any reason, it shall not invalidate any other portion thereof, but shall affect only that part so declared to be unconstitutional or invalid.

Sec. 10. Be it further enacted that all laws and parts of laws in conflict herewith be, and the same are hereby repealed.

Approved March 28, 1935.

APPENDIX D
Decided April 11, 1950
In the Supreme Court of Georgia

By the Court:

The act of 1935 (Ga. L. 1935, p. 450), which reduced the amount of monthly pensions to be paid to members of the fire department of the City of Atlanta who retired as a matter of right after 25 years' service, did not violate any vested contract and right of a member of the fire department who had not retired as a matter of right at the time of the passage of the 1935 amendment. Therefore, the amendment of 1935 was not violative of his rights under the provisions of art. 1, sec. 10, par. 1,

of the Constitution of the United States, nor under art. 12, sec. 1, par. 5, of the Constitution of Georgia of 1877.

A. J. Pender, a retired member of the fire department of Atlanta, petitioned Fulton Superior Court for the issuance of a writ of mandamus absolute requiring the Board of Trustees of the Firemen's Pension Fund of the City of Atlanta to pay him the sum of $25 per month from August, 1942, to date, in addition to the $75 which he has been paid per month since his retirement in 1942. His contentions as made by his petition, briefly stated, are as follows:

The pension fund was established by the City of Atlanta under the provisions of the Act of 1924 (Ga. L. 1924, p. 167), and under this act as amended by the act of 1931 (Ga. L. 1931, p. 223), he, as a member of the fire department, was, after 25 years' service, entitled to retire as a matter of right and receive a monthly pension of $100 per month for the remainder of his life. That he became a member of the fire department in 1915, and under the provisions of these acts he was assessed first 1 per centum of his monthly salary, and later the sum of 2 per centum, which was paid into the pension fund up to the time of his retirement. In 1935, the pension acts were amended (Ga. L. 1935, p. 450), and the amount of pension thereafter to be paid was reduced to $75 per month. In August, 1942, the petitioner made application for retirement and was placed on the pension roll, and since that time he has been paid the sum of $75 per month. In March, 1949, he made application to the defendants for an adjustment in his pension, and demanded that his pension be increased to $100 per month, to be retroactively applied to August, 1942. His application being denied, he then instituted the present proceeding, contending that the act of 1935 as applied to him was unconstitutional and void as being (a) violative of art. 1, sec. 10, par. 1, of the Constitution of the United States, in that said amendment impaired the obligation of the contract between him and the City of Atlanta, whereby the defendants were obligated to pay him $100 per month, and that said act was an ex post facto law which attempted retroactively

to change, modify, and annul the contract between him and the city; and (b) violative of art. 12, sec. 1, par. 5, of the Constitution of Georgia of 1877, because said act deprived him of a right granted to him under the act of 1924 as amended by the act of 1931, by reducing his pension without his knowledge or consent.

The general demurrers of the defendants to the petition being sustained, the plaintiff by writ of error seeks a reversal of the order dismissing the petition.

Almand, Justice. This court had before it in Trotzier v. McElroy, 182 Ga. 719 (..... S. E. .....), and West v. Anderson, 187 Ga. 587 (..... S. E. .....), the question as to whether the amendment of 1935, which reduced the amount of monthly pension from $100 to $75, as applied to a fireman who had been retired and placed on the pension roll prior to adoption of that amendment, violated the provision of the Federal Constitution forbidding the passage of any ex post facto law or law impairing the obligation of contracts. In the Trotzier case it was held that the city's agreement to pay a pension was a contract based on consideration flowing from both parties and gave the pensioner a vested right under the Federal Constitution which the act of 1935 impaired. In the opinion, after citing People ex rel. Donovan v. Retirement Board, 326 Ill. 579, 158 N. E. 220, 54 A. L. R. 940, it was said: "The editors of A. L. R. have stated in these annotations what we deem to be the proper construction and conclusions to be derived from the cases. On page 943 it is stated that 'The unquestioned rule is that a pension granted by the public authorities is not a contractual obligation, but a gratuitous allowance, in the continuance of which the pensioner has no vested right; and that a pension is accordingly terminable at the will of the grantor.' On page 945 the rule as to when a right to a pension becomes vested is stated as follows: 'It is, however, conceded that where any particular payment under a pension has become due, the pensioner has a vested right therein. . . . Accordingly, the ruling in this case is restricted to a holding that the pension is due only where the contingency pro-

vided for has occurred before a change in the charter, ordinance, or statute under authority of which the pension was to be paid. In the present case it is undisputed that the petitioner's rights had become vested before the amendatory act of 1935 (supra); and he became entitled, as a matter of right, to a pension of $100 per month and was actually being paid." P. 725. The West case involved the right of a widow of a deceased fireman who had retired prior to the act of 1935 to be paid the amount of the pension as fixed by the pension laws at the time of her husband's retirement. Following the Trotzier case, this court held that said amendment, as applied to the widow of a pensioner, violated the petitioner's rights. In the opinion in that case, it was said:

"We now hold that where, before the act of 1935, reducing the amount of 'pensions,' an Atlanta fireman had been retired in 1932, and was receiving a 'pension' of $100 per month under the prior acts up to the time of his death in 1937, and where, during the period of such payments and at the time of his death, he had a wife, such widow, even though she had not yet drawn the 'pension' at the time of the act of 1935, and was not entitled thereto until after the death of the husband, nevertheless had such a vested right as, by virtue of art. 1, sec. 10, par. 1, of the Constitution of the United States (Code, § 1-134), and art. 1, sec. 3, par. 2, of the Constitution of the State (Code, § 2-302), could not be altered by the later act." P. 589.

In the case before us, the plaintiff had not retired at the time the amendment of 1935 was enacted, whereas in the Trotzier and West cases, supra, the member had retired and the right of the retired fireman to receive a pension of $100 per month had become a vested and matured obligation. These cases are therefore not controlling here.

The question now before us is: Did the plaintiff, as a member of the fire department before his retirement, as a matter of right, have such a vested contractual obligation as to the payment of a $100 monthly pension upon his subsequent retirement that prevented the General Assembly from reducing this

monthly pension? The nature of the contractual relationship must be determined from the statutes which created the pension fund. Under the act of 1924 as amended (Ga. L. 1924, p. 167; Ga. L. 1931, p. 223; Ga. L. 1935, p. 450), the City of Atlanta was required to raise and establish a fund "for the aid, relief, and pension of members of paid fire departments who are in active service at the time of the passage of this Act and whose names are on the payroll of such departments and future members of such departments, and their dependents in all cities in Georgia having a population of more than one hundred and fifty thousand (150,000) by the United States census of 1920 or any subsequent census of the United States." Under the act of 1924, a monthly tax of 1% was levied on the salaries of firemen and put into the fund, and the city was required to levy a tax of 1¼% on the premiums of fire and lightning insurance companies on policies issued on property situated in the City of Atlanta; and the proceeds of the tax, under the amendment of 1931, were required to be paid into the pension fund, and if the funds on hand were insufficient to carry out the purposes of the act, then the city was required to supply the deficiency out of the Treasury. Under section 2 of the act of 1924, "any member of such fire department who is in active service at the time of the passage of this Act and whose name is on the pay roll, and future members, may as a matter of right, retire from active service, provided he shall have served twenty-five (25) years in active service at the time of his retirement." Upon retiring as a matter of right, such retired fireman was entitled to receive "one-half of the salary he was receiving at the time of his retirement, for the rest of his life, to be paid monthly." Section 4, act of 1924. This section was amended in 1931 so as to provide that in no event should the pension be less than $100 per month. Under section 7 of the act of 1935, if a fireman, having served 25 years, died before his retirement, then his widow or minor children were entitled to receive the pension that the fireman would have received if he had been on the pension roll at the time of his death. The general purposes of the act are stated in section 20 of the act of 1924, which reads as

follows: "That the plan and purpose of this Act is to furnish aid, relief, and pension to aged and disabled firemen who are now or may be in the future in the active service of such departments and on the pay roll of such departments and to their dependents."

In August, 1942, when the plaintiff in this case retired, there was no provision in the act whereby, if he ceased to be a member of the fire department before he had served 25 years, or after serving 25 years and dying before retirement leaving no widow or minor children, then either he or his estate would have been entitled to a refund of the amounts taken from his salary and paid into the pension fund. Though not material in this case, it is worthy of note that a subsequent amendment gives the fireman or his estate a right to such refund. Ga. L. 1945, p. 1080.

It will thus be seen from a consideration of the pension act in force at the time of the 1935 amendment, that the obligation of the plaintiff was to contribute a certain per centum of his monthly salary to the pension fund until by reason of 25 years' service he becomes eligible to retire, and retires as a matter of right. The obligation of the city was to contribute the proceeds from a tax levy on insurance premiums to the pension fund and to supply any additional sum that was necessary to pay pensions to retired firemen; and after a fireman had retired as a matter of right, the city was obligated to pay him a monthly pension of one-half of the salary he was receiving at the time of his retirement, which pension should in no event be less than $100 per month. Before such retirement, the law creating the pension fund did not give a fireman contributing to the fund any present right or interest in such fund. Until his retirement after 25 years' service as a matter of right, or his retirement on account of disability prior to 25 years' service, his interest in the fund is inchoate and contingent. His right to be paid a pension out of the fund only became vested upon the contingencies prescribed in the statute. In this case the plaintiff, at the time of the adoption of the act of 1935, could not have lawfully re-

quired or demanded of the city payment of any sum out of the pension fund. His right to a pension in 1935 was dependent upon the happening of two events: (1) His being in service as a member of the fire department for 25 years, and (2) his retirement after the expiration of such period of service. Upon compliance with these two conditions, his right to a monthly pension became vested, and the obligation of the city to pay the pension matured. Until such events the General Assembly, without violating any vested or contractual rights of the plaintiff, could change the amount of pension to be paid. This court, in construing these same pension laws, in the case of Carlton v. West, 174 Ga. 394 (..... S. E. .....), held that a fireman who after serving for 35 years was discharged from the department, was not entitled to a pension as a matter of right, for the reason that at the time he applied for a pension he had been discharged as a fireman and could not retire as a matter of right. The Court of Appeals, in construing the statutes creating the police pension fund of the City of Atlanta, which in essential details are the same as the statutes pertaining to the firemen's pension fund, held in Green v. West, 62 Ga. App. 584 (.....S. E. .....), that a police officer discharged from the department before retirement did not have a property right in the amounts assessed against his salary and paid into the pension fund that gave him a right to recover such sums.

The provision of the State Constitution which prohibits the passage of retroactive laws applies only to enactments affecting or impairing vested obligations. Bullard v. Holman, 184 Ga. 788 (2) (..... S. E. .....). Laws which impair obligations of contracts are those which attempt to interfere with contracts existing at the time of their passage. National Bank of Augusta v. Augusta Cotton &c. Co., 104 Ga. 403 (..... S. E. .....). "It is well settled that it is no violation of the Constitution of the United States for a State to pass a law divesting a vested right, provided that right is not vested by the *contract* of the parties." Hardeman v. Downer, 39 Ga. 425, 436. The obligation of the contract protected by the Constitution is the law which binds the

parties to perform their agreement. Walker v. Whitehead, 83 U. S. 314 (1), ... L. ed. .....; Aycock v. Martin, 37 Ga. 124.

The nature of the right and interest of a municipal officer or employee contributing to a pension fund has been clearly stated in Dillon, Municipal Corporations, as follows: "*The fund from which municipal pensions are paid* is usually created by setting aside certain sources of public income, and frequently provisions is made that a stated sum per month shall be retained or deducted from the compensation of each of the officers in the department who may become entitled to a pension. Although the sum so deducted from the officer's compensation is called a part of the officer's compensation in the statute, yet the officer never receives it or controls it, and he can not prevent its appropriation to the fund in question. He has no power of disposition over it such as always accompanies ownership of property. A statute providing for such deduction in legal effect says that the officer shall receive as compensation each month the net amount payable to him, and that in addition thereto the State or municipality will create a fund by appropriating the amount retained each month for that purpose, from which, upon his resignation for bad health or bodily infirmity, or dismissal after long and meritorious service, a certain sum shall be paid to him, or at his death to his widow and children where the statute so provides. Being a fund raised in that way, it is *entirely at the disposal of the government until*, by the happening of one of the events stated—the resignation, retirement, or death of the officer—the right to the specific sum becomes vested in the officer or his representative. In making a change in the disposition of a fund of that character previous to the happening of one of the events mentioned, the State impairs no absolute right of property of the officer. The direction of the State that the fund should be one for the benefit of the officer or his representative under certain conditions is subject to change or revocation at any time at the will of the legislature. There is no contract on the part of the State that its disposition shall always continue as originally provided. Until the particular event should happen upon

which the money, or a part of it, is to be paid, there is no vested right in the officer to such payment. 1 Dillon on Municipal Corporations (5 ed.), § 431.

The rule that such municipal officer or employee has no such vested interest in such fund, in the absence of express legislative declaration creating such right, before his actual retirement, that prevents the legislature from reducing the amount of monthly pension to be paid upon retirement, is supported by practically all of the authorities from other jurisdictions. Pennie v. Reis, 132 U. S. 464; Emanuel v. Sproat (N. J.), 54 Atl. (2d) 765; Risch v. Board of Trustees of Policemen's Pension Fund (Wis.), 98 N. W. 954; Lage v. City of Marshalltown (Iowa), 235 N. W. 761; Lickert v. City of Omaha (Neb.), 12 N. W. (2d) 644; Bartlett v. Thompson (Wis.), 16 N. W. (2d) 420; Klench v. Board of Pension Fund Commissioners of Stockton (Cal.), 249 Pac. 46; Miller v. Price (Ky.), 139 S. E. (2d) 450. For annotations on the subject, see 54 A. L. R. 943; 98 A. L. R. 505; A. L. R. 1009; 137 A. L. R. 249.

In Pennie v. Reis, supra, under statutory provisions a police life and health fund was established. The fund was created out of deductions from salaries of police officers, and the statute provided that at the death of a member the representatives of his estate would be entitled to be paid the sum of $1000. Ward was a police officer at the time the statute was enacted. Before his death, the statute creating the fund was repealed and another statute was enacted which made new and different provisions for distribution of the pension fund. After death, his administrator sought to recover the sum provided for in the original statute. As to the administrator's general contention that the subsequent act deprived Ward of his property without due process of law, the court said: "Until the particular event should happen upon which the money or a part of it was to be paid, there was no vested right in the officer to such payment. His interest in the fund was, until then, a mere expectancy created by the law, and liable to be revoked or destroyed by the same authority." P. 471.

We therefore hold that the amendment of 1935 to the act of 1924 as amended, which reduced the amount of monthly pension to be paid to members of the Atlanta fire department upon their retirement from $100 per month to $75, as applied to the plaintiff, who was a member of the department at the time of the passage of the amendment of 1935, but who did not retire as a matter of right until 1942, did not violate any vested right of the plaintiff, nor was such amendment violative of art. 1, sec. 10, par. 1, of the Constitution of the United States, or of art. 12, sec. 1, par. 5, of the Constitution of Georgia of 1877.

It appearing from the plaintiff's petition that he is now being paid the monthly pension which he is lawfully entitled to be paid, there was no error committed in sustaining the general demurrers of the defendants and dismissing the petition.

Judgment affirmed.

All the Justices concur except Duckworth, C. J., Atkinson, P. J., and Head, J., who dissent.

APPENDIX E

Article XII, Section 1, Paragraph 5

Constitution of 1877 of the State of Georgia

VESTED RIGHTS SECURED. All rights, privileges and immunities which may have vested in, or accrued to, any person or persons, or corporation, in his, her, or their own right, or in any fiduciary capacity, under, and in virtue of, any act of the General Assembly, or any judgment, decree, or order, or other proceeding of any Court of competent jurisdiction, in this State, heretofore rendered, shall be held inviolate by all Courts before which they may be brought in question, unless attacked for fraud.

HOWARD ANGLIN, HUGH KILGORE, *et al*, Trustees of the Firemen's Pension Fund of the City of Atlanta, Petitioners, *vs.* A. J. BENDER	NO..... IN THE SUPREME COURT OF THE UNITED STATES October Term 1950

MOTION ON BEHALF OF THE RESPONDENT TO DISMISS PETITION FOR CERTIORARI

Now comes A. J. Bender, respondent, and respectfully moves the court to dismiss the petition for certiorari and to deny same on the following grounds:

1.

Respondent shows that said petition should be dismissed and should not be sanctioned for the reason that the elements essential to the jurisdiction of this Court in reviewing a decision of the court of last resort of the State of Georgia are lacking in that it appears that a decision by the Supreme Court of Georgia on the constitutionality of the Act of the Legislature of Georgia in question (Georgia Laws 1935, page 440) insofar as the Constitution of the United States was involved, was not necessary to the determination of the cause at issue, because a decision that the Act was invalid as violative of the Constitution of Georgia was sufficient to determine the case without reference to any Federal question. In this connection respondent shows that the Act in question (Georgia Laws 1935, page 440) was attacked as violating both the Federal and the State Constitutions, and the decision of the Supreme Court of Georgia held that the Act did violate both the Federal and the State Constitution. Thus it appears that a decision on

the Federal question was not necessary to the determination of the cause.

2.

Respondent moves the Court to dismiss the petition for the writ of certiorari, and to deny same, on the ground that the State and Federal questions are not so interwoven and enmeshed with the Federal question presented that the two cannot be separated. In addition to provisions which forbid impairment of the obligation of a contract found in the Federal Constitution and in the Constitution of the State of Georgia, the Respondent relied upon Article 12, Section 1, Paragraph 5 of the Constitution of Georgia which provides:

> "All rights, privileges and immunities which may have vested in or accrued to any person or persons, or corporations, in his, her, or their own right, under and by virtue of any Act of the General Assembly, shall be held inviolate by all the courts before which they may be brought in question unless attacked for fraud."

which provision of the Constitution of Georgia, Respondent shows, is substantially different, is wider in scope, and is more comprehensive than Article 1, Section 10, Paragraph I of the Constitution of the United States which provides:

> "No state shall pass any ex post facto law, or law impairing the obligation of contracts."

Respondent shows, therefore, even though this Court should reverse the Supreme Court of Georgia in its holding that the Act in question violated Article I, Section 10, Paragraph I of the Constitution of the United States, above quoted, and likewise erroneously decided that the Act in

question violated a similar provision of the Constitution of the State of Georgia, which questions are, to some extent, interwoven and enmeshed, nevertheless the decision of the Supreme Court of Georgia that the Act in question (Georgia Laws 1935, page 440) violated Article 12, Section 1, Paragraph 5 of the Constitution of Georgia, is an unrelated provision, substantially different from the Federal question and is a decision of the court of last resort of the State of Georgia, and is binding upon the petitioners for the writ of certiorari.

3.

Respondent shows that the petition for the writ of certiorari should be dismissed, and in any event should be denied, for the reason that the petitioners represent the City of Atlanta, chartered by the Legislature of Georgia, and existing only by virtue of statutes enacted by the General Assembly of Georgia, and in all things subservient to the Constitution and laws of the State of Georgia, the interpretation of which is vested by law in the Supreme Court of Georgia as final authority, and the Supreme Court of the United States ought not hear the complaint of the municipal authorities on an appeal from a decision of the court of last resort of the State of Georgia involving the interpretation of a local statute where the rights of a citizen of the United States are not denied, adversely affected, or impaired. Respondent shows in this connection that the petitioners for the writ of certiorari do not have such interests, and their individual rights as citizens are not so impaired or affected that the Court should entertain their petition to review and reverse the decision of the Supreme Court of Georgia.

4.

Respondent moves to dismiss the petition for writ of certiorari on the additional ground that the alleged con-

flict in decisions relied upon by petitioners in the writ of certiorari arises by virtue of interpretations placed upon statutes of different states by the court of last resort of such state, which condition and fact accounts for the alleged conflict of decisions. Respondent shows in this connection that there is no requirement or logic in a requirement that such decisions should be consistent with each other since they are based upon different laws and different interpretations of the law by authorities having the right to interpret same, and arise under different constitutions and statutes.

5.

Respondent shows that the petition for the writ of certiorari should be dismissed and in no event should same be granted because there is no public interest or substantial public right involved or deprivation of rights of an individual citizen to support an appeal in this case from a decision of the Supreme Court of Georgia on the interpretation of a statute of the State of Georgia, and the application of the Constitution of the State of Georgia thereto, so as to render said statute invalid. It is not shown in the petition for writ of certiorari that any substantial injustice will result to any person or to the public welfare. The principal decisions relied upon by the petitioners as in conflict with the decision of the Supreme Court of Georgia, from which appeal is sought, were rendered sixty years ago under conditions greatly at variance with conditions today, and on principles which have been expressly repudiated by the Supreme Court of Georgia, which has the right to interpret the statutes of Georgia, and is the final authority on the meaning thereof, and on the meaning of the provisions of the Constitution of Georgia.

WHEREFORE Respondent prays that the petition for the writ of certiorari be dismissed.

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GUY PARKER,
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Movant.

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ACKNOWLEDGMENT OF SERVICE

Due and legal service of the within Motion to Dismiss the PETITION FOR THE WRIT OF CERTIORARI is hereby acknowledged. Copy Received. All other and further notice and service is waived.

This 16 day of October, 1950.

JOHN E. FEAGIN
Counsel for Petitioners in Certiorari